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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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NO. 67877-9-I

**COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON**

CITY OF BELLINGHAM, a Washington municipal corporation and
PETER FRYE, an individual,

Appellants,

vs.

LIND BROS. CONSTRUCTION, LLC.,
a Washington limited liability company,

Respondent.

APPELLANT CITY OF BELLINGHAM'S REPLY BRIEF

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I. ARGUMENT

A. SEPA AND WETLAND ISSUES.

The only issue this Court needs to decide is whether or not the Hearing Examiner erred in her decision affirming the City's denial of Lind's lot line adjustment application. While a substantial portion of Lind's brief is devoted to SEPA and wetland issues, the Court should not decide these issues. If the Court affirms the Hearing Examiner's decision, the SEPA and wetland issues are moot for the reasons given on pages 35-37 of the City's Opening Brief.

If the Court reverses the Hearing Examiner's decision denying Lind's lot line adjustment, the Court should reject Lind's requests that it: (1) step into the shoes of the City's Planning Director and draft the wetland/stream permit conditions itself, and (2) decide the SEPA issues raised by Lind. (BOR 46). Instead, this Court should follow the lead of the Superior Court. In its order reversing the Hearing Examiner's decision denying the lot line adjustment application, the Superior Court declined Lind's request to address the SEPA and wetland issues raised by Lind. (CP 21, 194-195). Instead, the Court remanded the case to the City for City staff to issue a wetland/stream permit consistent with the Court's decision and the Hearing Examiner to issue a decision regarding Lind's appeal of the conditions in the Revised MDNS. (CP

21). This remand makes sense since the City has not yet issued a wetland/stream permit, and because the Hearing Examiner held that Lind's SEPA appeal issues were moot, she has not yet ruled on the merits of these issues.

1. The SEPA and wetland issues raised by Lind in its brief are not properly before this Court.

In its Brief, Lind challenges the City's use of SEPA in this case and a number of specific conditions contained in the Revised MDNS issued by the City.¹ (BOR 32-45). It also requests that the Court order the City to issue a wetland/stream permit with specific conditions. (BOR 46).

Lind assigns error to Conclusion of Law 15 which states in part: "[t]he basis for denial of the Wetland/Stream Permit was that it was dependent on the approval of the lot line adjustment, and, therefore, it could not be approved unless the lot line adjustment was approved." (BOR 5; CP 1561-1562, COL 15). Lind also assigns error to Conclusion of Law 18 which states: "[t]he Appellant has also challenged conditions required in the MDNS, as revised. Because the

¹ Because the SEPA and wetland issues not properly before this Court, the City did not brief these issues. If the Court determines that these issues are properly before the Court, the City respectfully requests the opportunity to submit supplemental briefing.

underlying permits were properly denied on other grounds the conditions imposed in the MDNS are moot." (BOR 5; CP 1562, COL 18). However, Lind fails to present any legal argument as to why Conclusions of Law 15 and 18 are in error. By failing to brief the alleged errors, Lind has abandoned his claim that the Hearing Examiner erred in declining to consider its SEPA and wetland issues in this appeal. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) (holding that it was evident the appellant had abandoned a claim on appeal because she failed to include argument or cites to authority on the issue in her opening brief or in her reply brief). Consequently, if this Court reverses the Hearing Examiner's decision denying Lind's lot line adjustment, it should decline to consider Lind's SEPA and wetland issues.

Additionally, the City filed the only appeal in this case challenging the Superior Court's decision to reverse the Hearing Examiner's decision denying Lind's lot line adjustment application. Lind did not file a cross appeal challenging Superior Court's decision to remand the remainder of the case to the City. Consequently, Lind is barred from now asking this Court to reverse the Superior Court's decision to remand the SEPA and wetland/stream permit issues to the

City and rule directly on these issues. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000) (Failure to cross-appeal an issue generally precludes its review on appeal).

B. LOT LINE ADJUSTMENT.

In its Opening Brief at 16-35, the City provided a detailed explanation of the legal basis for the Hearing Examiner's decision that Lind's lot line adjustment application failed to meet three of the four legal requirements necessary for approval under BMC 18.10.020 B. The City will not repeat its analysis here, but will respond to Lind's arguments to the contrary.

- 1. For the reasons described in the City's Opening Brief at 20-23, Lind's lot line adjustment proposal violates BMC 18.10.020 B. 2. because it takes two existing lots which are both substandard as to lot size and further reduces the size of each lot.**

- a. BMC 18.08.245 defines "lot area" for lot line adjustment purposes and excludes the pipestem portion of the lot from the calculation of "lot area."**

BMC 18.08.245 provides the definition of "lot area" and excludes the pipestem portion of a lot from the calculation of its size. Lind's proposed Lot B lot has a pipestem which the Hearing Examiner excluded from the calculation of the lot's size.² Lind argues that in

² Lind's existing lots do not have pipestems. The decision to design a lot with a pipestem was Lind's, as it is not a code requirement. The use of a pipestem enabled

determining that the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment, the Hearing Examiner erred in relying on BMC 18.08.245 to determine whether the existing lots are further reduced in size. (BOR 22). The court should reject this argument for three reasons.

First, Lind raises its argument regarding BMC 18.08.245 for the first time on appeal to this court. The issue was not raised before the Hearing Examiner or in Superior Court. "[A]n issue not presented to the trial court cannot be raised for the first time on appeal. ... We do not consider the failure to raise a material issue in the trial court to be a technicality." *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961). An appellate court "will not review a case on a theory different from that in which it was presented at the trial level. Questions not raised in that court will not be considered on appeal." *State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853 (1966). Therefore, this Court should not consider Lind's argument regarding BMC 18.08.245.

Second, Lind's argument that the definition of "lot area" has nothing to do with lot line adjustments is without merit. The City's definitions of both "lot line adjustment" and "lot" reference "lot area."

Lind to provide street frontage for both lots on Harrison Street and allowed Lind to avoid having to construct both Harrison Street and Star Court. (CP 690-691; 1559).

BMC 18.08.265 defines a "lot line adjustment" as a revision made for the purpose of adjusting boundary lines **which does not** create any additional lot, tract, parcel, site or division nor **create any lot**, tract, parcel site or division **which contains insufficient area** and dimension to meet minimum requirements for width and area for a building site. (Emphasis added). BMC 18.08.240 defines "**lot**" as a fractional part of subdivided lands having fixed boundaries **being of sufficient area** and dimension to meet minimum zoning requirements for width and area. 'Lot' includes tracts or parcels of land." (Emphasis added). Thus, the use of the definition "lot area" to determine whether "each parcel if already less than the required minimum is not further reduced as a result of the proposed lot line adjustment" under BMC 18.10.020 B. 2. is entirely appropriate.

Third, under Lind's lot line adjustment proposal, both of the existing lots which are substandard as to lot size are further reduced in size. (CP 1556-1557, COL 2). Proposed Lot A is reduced in size regardless of whether the pipestem area for Lot B was included in calculating the size of Lot B. Under BMC 18.10.020 B. 2. neither Lot A nor Lot B can be further reduced in size. State law provides the basis for the requirement that a lot line adjustment not make substandard lots even more substandard. See RCW 58.17.040 (6).

b. BMC 18.36.020 does not exempt Lind's lot line adjustment application from the lot size requirements of BMC 18.10.020 B. 2.

The City agrees with Lind that lot line adjustments created under BMC 18.10.020 for lots presently having less site area than the required minimum lot size are not subject to the minimum site area requirements of BMC 18.36.020. See BMC 18.36.020 A. 3. However, this exclusion does not exempt Lind's substandard sized lots from all lot size requirements as Lind claims. (CP 1559, COL 10). As the Hearing Examiner found, Lind's lot line adjustment application was still subject to BMC 18.10.020 B. 2.'s requirement that existing lots that do not meet the minimum density requirement are not further reduced in size by the proposed lot line adjustment. *Id.* This restriction prohibits making lots substandard in size even more substandard in size. *Id.*

Lind argues that BMC 18.36.020 A. 3. and BMC 18.10.020 B. 2. are contradictory and therefore must be interpreted in a harmonizing manner. (BOR 24). However, the exclusion of lot line adjustments from the minimum lot requirements of BMC 18.36.020 A. 3. does not create a contradiction as Lind claims. The Hearing Examiner did not rely on BMC 18.36.020 to deny Lind's lot line adjustment. Instead, she applied BMC 18.10.020 B. 2.'s requirement that existing lots that do not meet the minimum density requirement are not further reduced in

size by the proposed lot line adjustment. (CP 1559-1560, COL 10). For example this means that a lot containing 5,500 square feet located in an area where the required minimum lot size is 20,000 square feet may not be reduced below 5,500 square feet through a lot line adjustment. *Id.*

- c. **Lind's lot line adjustment proposal's failure to comply with BMC 18.10.020 B. 2's requirement that that each parcel that is already substandard as to size is not further reduced in size as a result of the proposed lot line adjustment is not an easily fixable error.**

Lind argues that problem with its proposed lots each being smaller than the existing substandard sized lots was easily correctable, and within a few hours of receiving the City's denial decision, its consultant Bruce Ayers quickly came up with three solutions to the problem. (BOR 25). Lind certainly did not quickly communicate these alleged solutions to the City. The City issued its lot line adjustment decision on January 13, 2010 (CP 780; 1546, FOF 32); however, Lind did not present its proposed solutions to each of the proposed lots being smaller than the existing substandard lots until over ten months later at the appeal hearing on September 29, 2010. (CP 1538; 1551, FOF 55).

As described in the City's Opening Brief at 22, the Hearing Examiner found that she lacked the authority to approve these new alternative lot line adjustment proposals that had not been properly

submitted pursuant to the procedures specified in BMC Chapter 18.10 for administrative review and approval by the Planning Department Director. (CP 1557, COL 4). For the reasons stated in the City's Opening Brief at 22-23, she also found that even if she had the authority to consider the options submitted by Lind for the first time at the appeal hearing to correct the lot area deficiency, none of the options submitted result in both proposed lots maintaining at least the site area now existing. (CP 1557, COL 3). While Lind assigns error to Hearing Examiner Conclusion of Law 3 which deals with this issue, Lind fails to present any legal argument as to why Conclusions of Law 3 is in error. By failing to brief the alleged error, Lind has abandoned this issue in this appeal. *State v. Wood* at 99; *Talps v. Arreola*, at 657.

2. Lind's lot line adjustment proposal's further infringement on the City's Land Use Development Ordinance under BMC 18.10.020 B. 3. is not based on Lot A being a "through lot."

As described in the City's Opening Brief at 27-29, the Hearing Examiner correctly concluded that Lind's lot line adjustment application further infringes on the City's Land Use Development Ordinance in violation of BMC 18.10.020 B. 3. because all of proposed Lot A is located within the 50-foot front yard setback for residential development.

Lind argues that the Hearing Examiner reached this decision

because she erroneously treated proposed Lot A as a “through lot” requiring two front yard setbacks.³ (BOR at 26). This is a false statement as the Hearing Examiner did not treat proposed Lot A as a through lot. Lot A is only 50 feet wide. (CP 891; 1557, COL 6). It abuts only one street, Harrison Street. (CP 1540, FOF 7). Only one 50-foot front yard setback from Harrison Street, the abutting street, is required. (CP 1557-1558, COL 6). Because proposed Lot A is only 50 feet wide, the 50-foot front yard setback from Harrison Street consumes the entire lot, leaving no building envelope on the lot. *Id.*

In erroneously arguing that the Hearing Examiner treated proposed Lot A as a through lot, Lind states that Harrison Street was not and is not the principal means of access to abutting property, and is not a street under the City's definition of street. (BOR 26-27). Lind also asks the court to “[h]old as a matter of law that Harrison Street Right of Way is not a 'street'”. (BOR 46).

BMC 18.08.420 defines a "street" as a right-of-way having a width of 30 feet or more which provides the principal means of access to abutting property. The Hearing Examiner found that Harrison Street

³ The existing lots are through lots under BMC 18.08.270 as they both abut Harrison Street to the south and Star Court to the north. (CP 852). However, both of the existing lots have sufficient dimensions to meet the front yard setbacks from both streets. (CP 1558, COL 6).

is a non-arterial, residential access street under this definition as the Harrison Street right-of-way is approximately 33.67 feet in width, and Lind's lot line adjustment proposal relies on Harrison Street as the principal means of access for both Lots A and B. (CP 511; 788; 1540, FOF 9; 1550-1551, FOF 54). The Court should reject Lind's argument.

3. Lind's lot line adjustment proposal does not improve the "overall function and utility of the existing lots" as required by BMC 18.10.020 B. 4.

As explained in the City's Opening Brief at 31-35, the Hearing Examiner found that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots. (CP 1558-1559, COL 7-8).

a. The existing lots have sufficient area and dimensions to dedicate the necessary right-of-way and still be buildable.

Lind claims that the right-of-way dedication requirements were never brought to Lind's attention before the denial, and the overall function and utility of the lot is actually increased despite that the required dedication of additional right-of-way for Harrison Street. (BOR 28). These claims are unsupported by the record. As discussed in the City's Opening Brief at 8-9, City staff informed Lind of the Bellingham Municipal Code requirement of a minimum standard street

for accessing the Lind property. (CP 235-237; 883-884; 1364; 1541, FOF 15). Also, the overall function and utility of Lot A is not actually increased despite the required dedication of additional right-of-way for Harrison Street. This dedication of 30 feet of additional right-of-way for Harrison Street reduces the depth of proposed Lot A to 20 feet making it unbuildable. (CP 895; 1558, COL7).

b. Lind's claim that the development on the proposed lots instead of the existing lots reduces direct impacts to wetlands and buffers is unsupported by the record as Lind has never submitted a proposal to develop two houses on the existing lots.

Lind claims that it is undisputed that assuming two houses are built on the two lots, the proposed lot line adjustment reduces direct impacts to wetlands and buffers. (BOR 28). Lind also argues that affirming the Hearing Examiner's lot line adjustment denial will lead to an absurd result: requiring Lind to construct one of the two houses in the middle of a wetland rather than constructing both houses on the upland. (BOR 27).

Lind's arguments are not supported by the record. First, Lind's proposed lot line adjustment creates one unbuildable lot and another lot that will require substantial impacts to a wetland and buffer area for development. (CP 1558-1559, COL 8). The proposal locates septic drainfields within the wetland buffer area and the access portion of Lot

B within the wetland. (CP 679-680; 899; 1542, FOF 19; 1554, FOF 66; 1558-1559, COL8). Lind's claim that the proposal improves the overall function and utility of the existing lots has no basis.

Second, Lind has never submitted an application to develop two houses on the existing lots, and the City has never evaluated such a proposal. (CP 267-268). Lind is comparing its current proposal to some undefined proposal on the existing lots. Without a specific proposal, Lind's claim that development of the existing lots would require one house and its septic system to be constructed in a wetland is not supported by the record. (BOR 27, 29; See CP 852 for a layout of the existing lots which shows that neither lot is completely consumed by wetlands).

c. Lind's lot line adjustment proposal will locate the septic systems for both lots in a wetland buffer in violation of BMC 16.50.080 D.

Lind claims that under the current lot configuration, each home will require a septic system, one of which would be located in a wetland. Therefore, septic function and utility is increased by the lot line adjustment. (BOR 29). Lind's claim is unsupported by the record, as the locations for the septic systems for homes on the existing lots have not been identified. What is known is that under Lind's lot line adjustment proposal, the septic systems for both lots will be located in a

wetland buffer in violation of the City's Wetland Stream Ordinance which severely limits the permitted uses within a wetland buffer to low impact uses:

Low impact uses which are consistent with the purpose and function of the buffer and do not detract from its integrity may be permitted within the buffer depending on the sensitivity of the wetland/stream. Examples of uses which may be permitted include pedestrian trails, interpretive signs, fishing access, conservation and educational activities, gathering berries, bird watching blinds, and swimming access.

BMC 16.50.080 D. Low impact uses permitted in a wetland buffer do not include septic systems.

d. In analyzing whether Lind's lot line adjustment proposal improved the "overall function and utility of the existing lots" the Hearing Examiner reviewed the proposal for compliance with the City's development and environmental standards.

Lind's claim that the City limited its analysis of whether the "overall function and utility of the existing lots" was improved to environmental issues is contrary to the record. (BOR 29). As described above, the analysis also included a review of compliance with the City's development and standards, including lot depths, setbacks, right-of-way dedications, access plans, and septic systems. Both City staff and the Hearing Examiner determined that after the necessary right-of-way dedications, the depth of Lind's proposed Lot A would be reduced to 20 feet, making it unbuildable.

Lind also argues that the Hearing Examiner erred in failing to consider the “economic function and utility as well as function and utility to the end user – the homeowner.” (BOR 30). For the reasons given in the City's Opening Brief at 34, the Court should reject this argument.

C. VARIANCES

To be approved by the City, a development proposal must comply with all relevant Bellingham Municipal Code provisions. This requirement applies to lot line adjustment applications. *Mason v. King County*, 134 Wash.App. 806, 811-814, 142 P.3d 637 (2006). If a proposal does not meet all relevant code requirements, the applicant must apply for variances from those code requirements that cannot be met prior to the City making a decision on the development proposal. If an applicant does not obtain variances from the code requirements its development proposal does not meet, the City will deny the proposal.

The process for seeking a variance requires an application, payment of fees, notice to the public, and a public hearing before the Hearing Examiner. BMC 18.48.010, 21.10.040 D. 7 and 21.10.120 (CP 1560, COL 11). The Hearing Examiner must find that the variance criteria are met in order to approve the variance. *Id.*

1. The City notified Lind of its concerns regarding its lot line

adjustment proposal and recommended it apply for variances from the City's development standards; however, Lind disregarded this recommendation.

The City processed the lot line adjustment and wetland/stream permit applications that Lind submitted to the City. Lind's applications did not include a request for variances from the City's development standards. (CP 236, 1545, FOF 31).

In its brief, Lind repeatedly argues that the City failed to inform it of the City's concerns regarding Lind's lot line adjustment proposal. (BOR 3, 17, 25, 31). The record fails to support this argument.

Because the application lacked adequate information to evaluate Lind's proposal for compliance with the City's development and environmental codes, as described in the City's Opening Brief at 7-10, City staff made repeated requests for more information over the course of three years. On at least two occasions, City staff expressed concern about how the proposal would meet City development standards and informed Lind representatives that they needed to show how its project would meet the City's development standards for zoning setbacks, rights-of-way, wetland buffers, and siting of the septic systems. (CP 236-237; 883-884; 1545, FOF 31).

As described in detail in the City's Opening Brief at pages 8-10, Lind did not attempt to supplement its applications despite City staff's

repeated recommendation to Lind's representatives that they consider a variance package to develop the property. As a result the Hearing Examiner correctly found that:

The record indicates that the City informed the applicant and its representatives of issues presented by the application and recommended that it consider submitting a variance package. Ultimately, the responsibility for compliance with procedural requirements and approval standards is the applicant's. The Appellant has not shown that the City failed to process its application in accordance with applicable regulations. (CP 1560-1561, COL 12).

2. The City cannot approve a lot line adjustment that fails to meet the City's development standards unless variances from those standards are obtained; otherwise, the City would be approving new lots which may be unbuildable.

Lind argues that even if it needed variances to build on the lots that would be created by its proposed lot line adjustment, it did not need to apply for variances with its lot line adjustment application; but instead it could wait and apply for variances when it applied for building permits. (BOR 27, 30). Lind's argument ignores that without approved variances, Lind's lot line adjustment application failed to meet three of the four Bellingham Municipal Code requirements for approval. Approving a lot line adjustment application that violates the City's development standards would violate both the Bellingham Municipal Code and state law. BMC 18.10.020 B.; *Mason v. King County*, at 811-813.

If Lind wanted relief from the City's development standards for its proposed lot line adjustment, it needed to apply for variances prior to the City making a decision on its lot line adjustment application. Otherwise, under Lind's approach, the City would be approving a lot configuration that did not meet City development standards based on the assumption that appropriate variances would be granted in the future. If the variances were denied, the City would be in the untenable position of approving the creation of unbuildable lots.

The Court should reject Lind's argument that the Hearing Examiner erred in denying a lot line adjustment that fails to meet the Bellingham Municipal Code requirements because Lind could apply for variances from these code requirements at some future date. (BOR 27 and 30). Under this reasoning, the City could never deny a development proposal based on the proposal not meeting code requirements because the applicant could always claim an intent to apply for a variance in the future.

The Hearing Examiner rejected Lind's argument that it is not required to apply for variances it may require in order to develop property prior to approval of a lot line adjustment finding that the approval criteria of BMC 18.10.020 require the Planning Department Director to determine whether the proposed lot line adjustment will

further infringe on the provisions of the Land Use Development Ordinance, and the failure of an applicant to obtain a needed variance may require the Director to deny the application. (CP 1560, COL 11).

The Hearing Examiner held that neither the Planning Department Director nor the applicant may assume that a variance will be granted. *Id.* In this case, the proposed configuration of Lot A would require, at a minimum, a variance from front yard setback requirements in order to place any structure on the lot. *Id.* The Hearing Examiner held it would be imprudent, and contrary to the requirements of BMC 18.10.020 B. 3. to approve the creation of such a lot without first determining whether a variance will be granted. *Id.*

3. Unlike Lind's proposed lots, the existing lots meet the City's development standards and do not require variances from these standards.

Unlike Lind's proposed lots, the existing lots have sufficient dimensions to meet the City's front yard setback, lot depth, and right-of-way requirements. The Hearing Examiner found that Lind's lot line adjustment proposal seeks to modify an existing lot that has sufficient dimensions to comply with the front yard setback requirements of the Land Use Development Ordinance, BMC 20.30.040 F., creating a lot that cannot comply with these requirements. (CP 1557-1558, COL 6).

The existing lots could also dedicate the necessary land for

additional right-of-way on Harrison Street and still maintain function and utility by providing the required 60-foot lot depth required by BMC 18.36.020 E. (CP 78; 678-679; 893). Dedication of up to an additional 30 feet of right-of-way for Harrison Street under the proposed lot configuration would result in Lot A having a 20-foot lot depth.(CP 895; 1558, COL 7). This circumstance, combined with the application of setback requirements to proposed Lot A, leaves it without function and utility. (CP 1558, COL 7). Lind's claim that this is a case of taking lots with code challenges and adjusting them into lots with a similar level of code challenges is unsupported by the record. (BOR 30).

D. LIND'S FACTUAL CLAIMS AND LEGAL ARGUMENTS UNSUPPORTED BY THE RECORD.

- 1. Lind has abandoned its assignment of error to the Hearing Examiner's Findings of Fact 4, 11, 15, 16, 19, 24, 26, 38-49, 55-63, 67, 68, 69, and 70 as it has failed to present any argument or citations to the record showing how these findings are not supported by substantial evidence.**

Lind assigns error to numerous Hearing Examiner Findings of Fact (BOR 4-5). However, Lind fails to present any argument and/or citations to the record showing that challenged Findings of Fact 4, 11, 15, 16, 19, 24, 26, 38-49, 55-63, 67, 68, 69, and 70 are not supported by substantial evidence. By failing to argue these alleged errors in its brief, Lind has abandoned these issues in this appeal. *Valley View*

Industrial Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (“A party abandons assignments of error to findings of fact if it fails to argue them in its brief.”).

2. Lind has abandoned its assignment of error to the Hearing Examiner's Conclusions of Law 3, 4, 5, 8, 9, 10, 12, 15, 17, and 18 by failing to present any legal argument as to why the conclusions are in error.

Lind assigns error to the Hearing Examiner's Conclusions of Law "#2-12; 14-8". (BOR 5). However, Lind fails to present any legal argument as to why Conclusions of Law 3, 4, 5, 8, 9, 10, 12, 15, 17, and 18 are in error. By failing to brief the alleged errors, Lind has abandoned these issues in this appeal. *State v. Wood* at 99; *Talps v. Arreola*, at 657.

3. The City kept Lind representatives, including its owner, engineering firm, and wetland biologists, informed of the status of Lind's lot line adjustment application.

Lind argues that the City erred in not dealing directly with Bruce Ayers, the person listed as the contact person on the initial applications. (BOR 8, 12, 13, 18, 19, 20). However, after the initial applications were filed on December 5, 2005, all of the City's contact with Lind representatives was with Lind's owner, John Lind, employees from Jones Engineers, and Lind's wetland biologists. City staff met with John Lind and his wetland biologist on October 10, 2006

and John Lind and David New of Jones Engineering on March 13, 2007. (CP 235-237; 1364; 1541, FOF 15). After the City's repeated requests for additional information in 2006 and 2007, including its final request for information dated March 29, 2007, it was David New of Jones Engineers and not Bruce Ayers who finally responded to the City's requests on December 5, 2008 by providing the City a complete SEPA checklist and detailed information regarding its development proposal. (CP 205-206; 1004-1014; 1367; 1542-1543, FOF 18-21). This information from Jones Engineering was the last major submittal by Lind prior to the City's final review of the project. (CP 294).

The SEPA checklist submitted by Jones Engineering on December 5, 2008 was signed by Bryce Akre and identified John Lind as the applicant and "Bryce Akre or David New" from Jones Engineers as the contact persons. It made no mention of Bruce Ayers. (CP 1004). Also, the cover letter from Jones Engineering accompanying the submittal did not copy Bruce Ayers. (CP 293-294, 1367).

Consistent with the contact information listed on the SEPA checklist, City Planner Kim Weil testified that due to her contact with representatives from Jones Engineering and her lack of contact with Bruce Ayers since the beginning of the project, she thought Jones Engineering was the contact for the project. (CP 237, 290-291).

Consequently, she copied Jones Engineering on the June 12, 2009 letter she sent to Lind Bros. LLC's owner John Lind informing him that the City had completed analysis of the applications. (CP 1122). The last contact the City had with Bruce Ayers regarding Lind's applications prior to issuing its January 2010 decision regarding Lind's proposal was a February 16, 2006 letter informing Mr. Ayers that the City had still not received the information it requested on January 10, 2006. (CP 881). The City never received a response from Mr. Ayers to this letter.

For Lind to now argue that the City erred by failing to keep to keep Bruce Ayers informed of the status of its application is disingenuous. The record shows that the City kept Lind representatives, including its owner, engineering firm, and wetland biologists, informed of the status of Lind's lot line adjustment application at all times. Mr. Ayers' lack of involvement in the project is not the City's fault and is irrelevant to the legal issues in this case.

4. The City did not plan to approve Lind's lot line adjustment proposal until it was pressured by neighbors near the property to deny the proposal.

Lind falsely states that the City planned to approve the lot line adjustment and wetland/stream permit applications all along, but then "changed its mind at the last moment, in response to the neighbors' comments and 'environmental concerns' they raised", and "denied the

applications on untenable grounds that were never discussed during the four year life of the project." (BOR 17, 18). As described in the City's Opening Brief at 7-10, from shortly after Lind filed its lot line adjustment and wetland/stream permit applications in December 2005 through June 2009, City staff consistently expressed concerns to Lind representatives, both orally and in writing, about how the proposal would meet the City's development and environmental standards.

Throughout the review process, the City also received comments from interested neighbors expressing similar concerns. (CP 1382-1400). Contrary to Lind's claim otherwise, the City's denial of Lind's lot line adjustment proposal was unrelated to the issue raised by some of the Lind's neighbors that the wetland on the property was part of a mature forested wetland, subject to greater protection under the City's Wetland Stream Ordinance. The City addressed the neighbors' concerns about the wetland on the Lind property by issuing a Revised MDNS for the project that included a condition (Revised MDNS Condition #10) that requires Lind to analyze whether or not the wetland met the requirements of a mature forested wetland. (CP 1127-1128; 1544-1555, FOF 27).

The City did not change its mind and deny Lind's lot line adjustment proposal on untenable grounds. At the direction of the

Planning Department Director, City staff drafted decisions both approving and denying the lot line adjustment and wetland stream permit for review by the Director. Under BMC 21.10.040 C. both decisions are Type II administrative decisions made by the Planning Director. In the end, the Planning Director agreed with staff's analysis and recommendation to deny Lind's lot line adjustment and wetland/stream permit applications.⁴

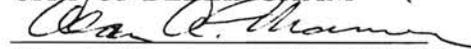
5. **As described in the City's Opening Brief at 23-25, Lind's claim that the City placed its lot line adjustment application on hold is not supported by the record.**
6. **As described in the City's Opening Brief at 7-11, Lind's claim that the City failed to notify Lind of deficiencies in its applications is not supported by the record.**

II. CONCLUSION

The Court should affirm the Hearing Examiner's decision and deny Lind's requested relief.

Respectfully submitted this 20 day of June 2012.

CITY OF BELLINGHAM


Alan A. Marriner, WSBA #17515
Assistant City Attorney

⁴ Lind's lot line adjustment proposal did not comply with the conditions 1, 3, 4, and 5 of the draft wetland/stream permit. (CP 1306-1307). As explained in the City's decision denying the lot line adjustment and wetland/stream permit, the Planning Director decided against issuing a wetland/stream permit for a lot line adjustment proposal that the City had denied. (CP 1059).

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ORIGINAL

IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION ONE

**CITY OF BELLINGHAM, a
Washington municipal corporation and
PETER FRYE, an individual,**

Appellants,

vs.

**LIND BROS. CONSTRUCTION, LLC.,
a Washington limited liability company,**

Respondent.

No. 67877-9

CERTIFICATE OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On June 20, 2012, I served a true and correct copy of the following documents to be delivered as set forth below:

CERTIFICATE OF SERVICE -1

City of Bellingham
CITY ATTORNEY
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Bellingham, Washington 98225
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1. **Appellant City of Bellingham's Reply Brief; and**
2. **Certificate of Service.**

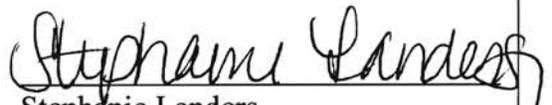
On the 20th day of June, 2012, I addressed said documents and deposited them for delivery as follows:

Peter Frye [X] By United States Mail
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DATED this 20th day of June, 2012.

CITY OF BELLINGHAM


Stephanie Landers
Legal Assistant